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HUMAN RIGHTS

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As I'm writing this, Christians are brutally murdering Muslims in the Central African Republic; people in Syria are being bombed, starved, and tortured; and homosexuals still face the death penalty in Iran as well as long prison sentences in countries like Uganda and Nigeria and persecution by thugs in many countries. These atrocities and many other disturbing phenomena are often called "human rights violations." What gives them this status? That is a question about which there has been a surprising amount of disagreement among political philosophers.

Not so long ago, the question "What are human rights?" would most likely have been answered with a simple definition. Something like "Human rights are the rights that we have simply by virtue of being human." The phrase "simply by virtue of being human" may be harder to unpack than it seems at first, but one of the commonly held ideas was that the possession of human rights is not dependent on any convention or institution. Human rights, in other words, are moral rights. This doesn't prevent them from becoming enshrined in treatises and conventions or from receiving protection through legal mechanisms, but legally protected human rights are also moral rights—rights

which we would have had even if these protections didn't exist.

This point seems intuitively so obvious that it is hard to see how anyone could deny it. Slavery violates a human right, not just because some UN body agreed on a document that says that slavery violates a human right. Surely those who were enslaved before the second half of the twentieth century had their human rights violated as well. Not everyone, however, has shared this intuition. Some have thought that it is at least awkward, perhaps even downright incoherent to think of human rights as somehow "existing" independent of the declarations that affirm them, or independently of any legal framework which brings them into existence (I take it that this is the point of Bentham's famous denouncement of human rights as "nonsense upon stilts").

The idea that human rights are essentially connected to institutions has recently taken a different form. Under the influence of John Rawls, several philosophers have developed what are now called "political theories of human rights." A prominent feature of several of these theories is the suggestion that human rights are misconceived if taken as an ethical doctrine rather than part of a distinctly political morality. Since this position has become influential, I shall first discuss two prominent

versions of this account. The relative merit of political theories versus alternatives will ultimately depend—among other things—on how they accommodate our most firmly held beliefs about the topic. Beitz, in particular, has argued that his theory provides a better fit with human rights doctrine and practice than traditional approaches to human rights. If he is right, we should indeed abandon the traditional approach to human rights and adopt some version of the political theory. As we shall see, however, the case in favor of political theories is at least overstated and the case for abandoning the traditional approach to theorizing human rights perhaps misguided. More positively, I shall suggest another approach—what I call a “descriptive approach”—that promises to do better on most of the criteria put forward to evaluate theories of human rights.

POLITICAL THEORIES OF HUMAN RIGHTS

One of the most controversial elements in Rawls’s theory of international relations is the truncated list of human rights. Rawls mentions rights to the means of subsistence (but not to health care or education); to freedom from slavery, serfdom, and forced occupation, and to a sufficient (but not necessarily equal) measure of liberty of conscience; to personal property; and to formal equality as expressed by the rules of natural justice (i.e. that similar cases be treated similarly) (Rawls, 1999, 65). Many commentators have found Rawls’s list of human rights objectionably illiberal. Such crucial rights as freedom of expression and association, as well as the right to democratic participation are missing from the list. Buchanan has

remarked that according to Rawls’s account, to prevent women or members of a particular racial or ethnic minority from getting an education, from voting, or from holding public office would not count as a violation of their human rights (Buchanan, 2010, 21). Rawls’s motivation seems to have been to avoid charges of parochialism. He remarked that human rights “as thus understood, cannot be rejected as peculiarly liberal or special to the Western tradition” (Rawls, 1999, 65). This raises two questions: First, why should we refrain from affirming “peculiarly liberal” human rights? Rawls does not seem to think much needs to be said in defense of the need for a “non-parochial” list of human rights. He simply states that if all societies were required to be liberal “then the idea of political liberalism would fail to express due toleration for other acceptable ways . . . of ordering society” (59). He presents a hypothetical example of a regime, Kazanistan, which—though it is not perfectly just—seems to Rawls decent because it protects this limited number of human rights (and is not expansionist and has a consultation hierarchy) and then appeals to the reader’s intuition to agree with his judgment (76–78). There is little else by way of an argument. The other question is how Rawls arrives at his peculiar list of human rights. It would not be possible (nor does Rawls intend) to argue for this selection from actual agreement: even if such agreement were to exist, it would not carry the normative weight necessary to justify a list of human rights. He seems to think that the list can be justified by employing the idea of a system of social cooperation. When these rights are regularly violated, he writes, “we have command by force, a slave system, and no cooperation of any kind” (68). Again, however, this is merely stated, not argued. It is not clear why, say, a state that used public

resources to support a hereditary elite in luxury and keeps everyone else at the level of subsistence (Buchanan, 2010, 21) would count as a system of social cooperation, even if this state had a decent consultation hierarchy, or why personal property is a prerequisite for social cooperation.

Human rights perform a specific function in Rawls's theory: their violation can justify military intervention by foreign powers (Tasioulas, 2009). He does recognize a broader set of rights—which he calls liberal constitutional rights—that are genuinely possessed by all, but are not properly human rights because their violation does not give rise to a (defeasible) reason for the international community to forcefully intervene in a society. This is highly revisionist: while humanitarian intervention is increasingly accepted in international law, justifying it is by no means the only, or even the main, function of human rights. Liberal and decent societies, says Rawls, have the right not to tolerate outlaw states, and they have a duty of assisting burdened societies (i.e. societies which are unable to become well-ordered on their own). The duty of assistance must—within the contractarian framework of the law of peoples—be derived from the self-interest of liberal and decent societies (Steinhoff, 2012). Similarly, we might think that the specific list of human rights could somehow be derived from the interest of well-ordered societies, perhaps in creating an international environment free from instability. However, even if we can readily think of situations where intervention to protect human rights serves the interest of other states in international stability and peace, it again remains completely unclear how this interest would ground the specific list favored by Rawls.

Some of this may explain why Rawls's specific treatment of human rights has not been

particularly influential. His general approach to the topic, however, has received considerable following. Charles Beitz, for example, presents what he calls a “practical approach” to human rights that is inspired by Rawls. He suggests that “human rights” is an emergent political practice, rather than a normative idea (Beitz, 2009, xii). Consequently, talk about human rights being possessed by humans “simply in virtue of their humanity” is at best a confusing way of indicating that they apply to all human beings—confusing because it falsely suggests that these rights have some existence independently of the practice. His approach shares two crucial features with Rawls's account. One is that human rights have a distinctly political role. According to Beitz, human rights apply in the first instance to the political institutions of states, but they may become a matter of international concern when governments fail to carry out their duties. When they do so, human rights have an interference-justifying role. This role is central to understanding the discursive functions of human rights, Beitz maintains, even if it does not exhaust the range of measures for which human rights violations might provide reasons. The second feature that this account shares with Rawls's is that it denies that we can adequately theorize human rights through ordinary moral reasoning. Since human rights is a practice, we can only understand the concept of human rights by analyzing what is inherent in it. If successful, the analysis would represent a consensus among competent participants in the practice, but not necessarily a consensus about the practice's normative contents. Beitz uses the Rawlsian distinction between concept and conception to clarify this thought. Different people who have different conceptions of human rights may nevertheless share the same concept, because

they could agree on the role of human rights in practical reasoning about the conduct of global political life (99).

There is something strangely odd about this account. While it seems very empirically oriented, it is also clearly revisionist. The problem is not with the claim that past theories of human rights have misdescribed something essential. It is rather with the thought that the authors of these theories could have been mistaken about the very fact that they were discussing a normative idea. To this, Beitz might respond that these authors could well have been discussing a normative idea, but that they were mistaken in identifying this normative idea with the idea (or practice) of human rights. Such a response, however, is inconsistent with linguistic practice, even with the language used in UN declarations and conventions. More importantly, however, it would only turn the disagreement into a terminological quibble that could be easily resolved by distinguishing—as, for example, Wellman (2011) does—between “moral human rights” and “international human rights.” Beitz, of course, would resist the conclusion that a mere terminological decision could resolve the issue, since he thinks that conceiving human rights as natural rights has contributed much of the distortion in philosophical understandings of human rights.

MORAL RIGHTS AND INTERNATIONAL HUMAN RIGHTS

How should we conceive the relation between moral human rights and international human rights—meaning the existing global legal-institutional phenomenon of human rights? (Buchanan, 2010). At one end of a spectrum, one could think that these are

separate phenomena. Moral human rights (HR) are the subject of traditional, naturalist, theories of human rights, while international human rights (IHR) are the preoccupation of political theories of human rights. But this is obviously unsatisfactory. If moral theorizing strives to be relevant to our actual going-about in the world, as it certainly should, then theories of moral human rights should have the ambition to bear on actual attempts to legally protect human rights, and hence on IHR. For example, a theory of HR may find that some human rights are not yet protected by international institutions, even though they ought to be. Or it might conclude that many of the supposed human rights enshrined in international declarations and conventions are not real (moral) human rights. This may or may not be a problem. It could be a problem, for example, if the promotion of otherwise worthwhile social goals under the guise of human rights damages the sense of urgency that is properly attached to a claim that a human right is not sufficiently protected or has been violated.

If it is implausible or undesirable to think of moral human rights as entirely independent of IHR, it would be equally misguided to shift to the other end of the spectrum. That is, it would be equally wrong to think that the rights protected by IHR can only be justified if for each legal human right there is a corresponding moral human right. The international system of human rights treaties and conventions may serve several goals. One of those goals should obviously be to further the protection of moral human rights, but another possible goal served by IHR could be to promote peace. Preventing war is of course also likely to decrease the violation of moral human rights, but the mere avoidance of human suffering may be an independent and sufficient ground for promoting peace

through international human rights legislation. Again, IHR may have as one of its aims to further social justice and in the pursuit of that aim some of its agents could well promulgate rights that are not moral human rights. Clearly, the mere fact that some of the rights incorporated in IHR are not moral human rights is not in itself sufficient ground to conclude that the inclusion of those rights in IHR is illegitimate. Nor does this stance imply that theories of moral human rights have no practical consequences. If we found, for example, that the introduction of certain legal rights in IHR in pursuit of otherwise worthy goals would undermine the system's effectiveness in protecting genuine moral human rights, this would raise serious questions regarding the desirability of these legal rights. The protection of moral human rights may not always take priority over the pursuit of other goals, but it certainly does in many cases.

It seems that we have reason to value IHR, whether or not we find that it is best seen as nothing more than a straightforward attempt to enforce moral human rights. Hence, even a significant divergence of HR from IHR would not automatically justify a demand to reform the latter. In fact, any theory of moral human rights would bear a significant burden of justification if it recommended drastic changes in IHR. None of this, however, warrants the dismissal of normative theories of HR as irrelevant or misguided when they aspire to provide a yardstick for the assessment of IHR. The language of the UDHR and of the most important other conventions shows that the drafters of these documents thought of human rights as preexisting moral rights. If moral philosophers have been mistaken in thinking that moral human rights are relevant, they are surely in good company. But if the majority of current participants in the practice of IHR share the idea

that the strong moral force attached to many or most of the rights acknowledged by IHR is due to the fact that they are (also) preexisting moral rights, as I think they do, then the illumination of HR is not just a luxury but quite simply an essential element of a proper assessment of IHR.

CONSTRAINTS ON THEORIES OF HUMAN RIGHTS

How should we evaluate a theory of human rights? A helpful starting point is Allen Buchanan's list of desiderata:

1. *Consonance*. A theory of HR should be consonant with our most stable intuitions on the topic.
2. *Reasonable fit*. It should fit reasonably with the doctrine and practice of human rights.
3. *Constraint*. It should curb human rights inflation.
4. *Content*. It should help us determine the content of various human rights.
5. *Guidance*. It should help us resolve conflicts among human rights.
6. *Non-parochialism*. It should include a response to the parochialism objection.

Anyone who agrees with the suggestion that moral human rights is a distinct idea that deserves to be taken seriously because of the influence it (still) has on the practice of human rights will also agree that desideratum #1 should take priority over desideratum #2. However, I shall suggest that even the natural rights theories that perform best on this criterion (say, those of Gewirth, 1978, Griffin, 2008) fail the desideratum of consonance in important respects. The main reason for this is that our intuitions regarding human rights

are the historical offspring of two very different (traditions of) natural rights theories: theories of property rights (in a very broad sense) and theories of welfare rights (in a very broad sense). So even if we find that no particular natural rights theory satisfies desideratum #1, it doesn't rule out the possibility that different natural rights theories *together* satisfy the criterion. However, since these theories are incompatible in their practical consequences, the only way we could regard them as satisfying the criterion of consonance together is to abandon the perspective of normative theorizing. As long as we are merely trying to find out *what* human rights are, that is no objection. I shall point out later that this way of asking the question what human rights are will affect the desiderata and hence what we expect from a theory of human rights rather dramatically.

FIVE CHALLENGES AGAINST NATURALISTIC THEORIES

Theories of HR can be (and have been) challenged on most of these criteria. Four of the most significant challenges have to do with scopes (#1 and #3), the political nature of human rights (#2), the distribution of correlative duties (#4), and the relation between human rights and their justification (#6).

1. At the most general level, the issue of scope is about whether any naturalist theory of HR is able to give a satisfactory answer to the question which rights we have. But there is a problem. Anyone's view on whether a particular theory *has* given a satisfactory answer to the question which rights we have obviously depends on one's view of what counts as a satisfactory answer. Take, for example, contemporary libertarian natural rights

theories. Libertarians typically deny that we have any innate moral right to such things as basic health care or elementary education. For some political theorists, this in itself serves to show that the libertarian is not talking about (international) human rights. The libertarian, however, is unlikely to be impressed by this, for she is unlikely to share the political theorist's view of the relation between HR and IHR. Most libertarians would condemn the practice of levying tax on citizens in order to finance a system of universal health care or education as a violation of the property rights of the wealthy. This is not even a case of a conflict of rights—the rights of property owners on the one hand and the rights of the needy on the other—since the libertarian denies that the needy have moral rights to such provisions. To the extent that IHR stimulates states to finance systems of universal health care through taxation, the libertarian will view it as complicit in the large-scale violation of the human rights of property owners rather than attempting to protect human rights. If the political theorist wants to insist that the libertarian is talking about natural rights rather than human rights, she may well do so but it will seem little more than a word game to the libertarian. After all, the crucial function of libertarian natural rights is to distinguish legitimate from illegitimate uses of government force, which is also the most important function of human rights for the political theorist. So while the political theorist may think that the libertarian has not even addressed human rights, the libertarian will obviously disagree.

The criterion of consonance as applied to scope is also likely to leave us begging the question when intuitions differ. Given that most right-libertarian theories do not acknowledge such rights as health care and education, most of us may find that these

theories are not consonant with “our” most stable intuitions on the topic. This doesn’t seem to bother most libertarians, and it is not immediately clear that it should. Instead, they may well scorn the suggestion that the truth about human rights should depend on the intuitions of even a majority of people. Unfortunately, the role of intuitions in discovering ethical truth raises problems far too complex to be pursued here.

What if we take for granted that most of us (non-libertarians) agree sufficiently on the scope of human rights for there to be a benchmark to compare theories of human rights with? Let us further assume that this *quasi*-consensus is fairly close to the list of human rights endorsed by the most important human rights treaties and conventions. Would this give us a reason to discard naturalist theories of human rights because the list of rights they generate is simply too short to be recognizable as a list of human rights? It would if all naturalist theories were of the libertarian variety. But that is not the case: philosophers like Gewirth and Griffin have built theories that imply much more extensive sets of human rights. So the complaint about the limited normative reach of naturalistic theories rests on a disregard for the considerable variety in this group of theories. The problem of scope takes on a different form for several of these theories, though, because it is unclear whether they are able to prevent rights inflation (#3; see later).

2. What reason might we have to think that human rights are in the first instance rights against states? Philosophers are used to thinking of some rights as moral entities. In daily life, however, we think of ourselves as exercising rights primarily in legal/political contexts. The main idea that comes to mind when we think of a right to protest is a duty of the government not to persecute

protesters. When we talk about rights that we have against other people, we usually have legal rights in mind. Most of us would not ordinarily speak of yourself as having a right against your friend that she goes to the movies with you because she promised to do so. I gather that even philosophers who are prone to talk about promises generating rights would not use the word “right” in ordinary life when describing the situation created by a promise. Compared to this, it is perhaps a remarkable feat about our linguistic intuitions that talk about promises generating rights doesn’t come across as awkward at all. Because the notion of a right of a promise doesn’t strike us as a category mistake, the divergence in philosophical work from ordinary linguistic practice is not normally considered a ground for rejecting theories that construe promises as generating rights. This is important because the idea that human rights are distinctly political rather than moral could be seen as receiving support from linguistic practice in a similar manner. We are more likely to use phrases like “human rights violations” when confronted with large-scale violence and oppression committed by government agents against civilians, especially because these incidents are also far more prevalent than, say, similar violence committed by rogue militia. Still, since the label “human rights violations” does not induce a conceptual shock when applied, for example, to the atrocities committed by nongovernmental militia in Syria, we should resist the temptation to take linguistic practice as sufficient basis for theoretical claims about human rights.

Another argument brought forward by proponents of political theories of human rights is that some human rights presuppose the existence of modern states. Such rights as the right to asylum, or to a nationality are

not even conceivable outside the framework of modern nation-states. Does this show that human rights are specifically modern, and hence that they cannot possibly be rights imagined by natural rights theorists which human beings could have even in a state of nature. There is a simple answer to this objection. Such rights as the right to asylum are derived from more fundamental rights which do not presuppose the existence of a state system (see, e.g. Wellman, 2011, 41–70). One of the main grounds for granting refugees asylum is that they risk persecution. It is thus easy to see that the right not to be persecuted is more fundamental than the right to asylum. Even more fundamental than the right to asylum is the right to physical integrity. This right surely could conceivably exist in a world that has no modern system of sovereign states (but see Beitz, 2009, 55).

3. The first complaint against natural rights theories was that their scope is much more restricted than that of contemporary human rights practice. As we saw, this may be true of some naturalistic theories, but is certainly not true of all of them. For some of these theories, the opposite may well be true. That is, they fail to constrain the proliferation of human rights. Consider, for example, Griffin's recent defense of rights based on personhood. "Human rights," Griffin writes, "can be seen as protections of our human standing, or, . . . personhood" (Griffin, 2008, 33). To be a person or agent in the fullest sense of which we are capable, we need three things: autonomy (being able to choose one's own path through life), minimal provision (so that we are able to act upon one's choices), and liberty (others not forcibly stopping us from pursuing what we see as a worthwhile life) (33). Griffin also tells us that human rights "are rights not to anything that promotes human good or flourishing, but merely

to what is needed for human status" (34). This suggests a very minimalist interpretation of the requirements of human rights. Most of us will grow up to be autonomous beings even without a formal education. People living in severe poverty are normally able to act, even if they may not be able to derive much satisfaction from their life or achieve many of their goals. Again, people who are imprisoned may be prevented from pursuing many of their projects, but not necessarily to such an extent as to be deprived of their personhood. Thus it seems that the set of human rights generated by Griffin's theory must be exceedingly small—so small as to be hardly recognizable as a list of human rights. In fact, the criterion of personhood may not even prohibit most forms of torture.

Griffin realizes that a strict interpretation of the agency criterion doesn't produce a plausible list of human rights, but he denies that this is the conception at the core of his theory. Instead, he claims to have in mind a "somewhat ampler picture" of someone autonomous "who, within limits, is not blocked from pursuing his or her conception of a worthwhile life" (34). The crucial question is where to draw the line. For example: we are told that education is necessary because it is a condition for effective agency, but that there are levels of education beyond what is required by human rights (53). Since education is almost never needed for a human being to become an agent, and since Griffin insists that we do not have a right to education sufficient for human flourishing, the theory should be able to tell us something about the amount of education necessary for "effective" agency. Griffin, unfortunately, tells us nothing of the kind, and he is equally silent regarding the level protection required by minimal provision. These problems are not specific to Griffin's theory. Other versions of

the theory that aims to ground rights in personhood (like those of Gewirth or Plant) suffer the exact same weaknesses. They start out with the idea that human rights only require that we have the things that allow us to be agents, but—realizing that this is insufficient for a plausible theory of human rights—continue that we should have the means for the effective exercise of our agency. Of course, no theory could be plausible if it required that we should have the means for any or all of our actions to be effective. The problem is that these theories lack the theoretical resource to nonarbitrarily limit the amount of support that human rights require. Griffin appeals to “practicalities” to plug the gap, but he doesn’t provide much insight as to how these are supposed to work (Van Duffel, 2013). Thus the best contemporary natural rights theories fail to provide a convincing cure for the proliferation of rights.

The proliferation of human rights and the inability of natural rights theories to stop that proliferation may be a serious cause for concern, but it is not a reason to embrace political theories of human rights. The phenomenon of human rights proliferation that disturbs many is internal to the IHR practice. Some political theories may rule out certain candidates as incompatible with the idea of human rights as it is inherent in IHR, but these theories have as yet not given us a credible instrument to constrain the proliferation of human rights.

4. Many of the rights that we have are correlative to duties of other people. Some of these duties—so-called negative duties, like the duty not to kill—can be fulfilled simply by abstaining from certain actions. Some rights, however, are correlative to positive duties, which require others to actually provide a good or a service. A human right to subsistence is only meaningful if there is

someone who has a duty to provide necessities when they are lacking. The problem is that most people also believe that you can have a duty something only when you are able to do it. If a train is about to crash into a crowd and kill dozens of people, I certainly have a duty to stop it if I can, but it doesn’t make sense to say that I have such a duty if I am unable to fulfill it. A significant difference between negative duties and positive duties, however, is that it is always possible for everyone to abstain from murdering someone, but we may often be unable to provide food or education or health care for everyone in need. If we can only have a duty when we are able to fulfill it, then we cannot have a duty to provide health care for everyone, and if we don’t have this duty then there can be no human right to health care. Some have hence concluded that the idea of social and economic human rights is incoherent (see Cranston, 1967).

This criticism has given rise to an extensive literature, much of which has been devoted to defending such human right as the right to subsistence, to education, to health care. Some have questioned the practical import of the distinction between negative and positive rights, claiming that protecting a right to bodily integrity requires that governments maintain a police force and a judicial system. Others have pointed out that positive rights only require that we support institutions that provide for the needy. Yet others have maintained that human rights only require that we do what is in our power to provide the things that people have a right to. A fourth suggestion is to restrict the use of the phrase “human right” to legally enforceable claims. I have argued elsewhere (Van Duffel, 2013) that none of these responses are satisfactory, and so we are left with a problem. Our intuitions regarding moral human rights

seem incoherent because these rights demand more of us than we might at times be able to provide. As far as I can see, this problem is not solved by political theories of human rights. The fact that they allocate primary duties to states which are generally better able to respond to standard threats than individuals is not sufficient to render the idea of positive human rights coherent.

5. No matter how dominant the language of human rights has become in the public arena, doubts regarding the universality (or, better, non-parochialism) of human rights have never entirely disappeared. Indeed, one of the prime incentives for the development of political theories may have been the desire to detach the idea of human rights from substantive commitments to the liberal tradition or to any particular normative theory. Christians, Muslims, and atheists, as well as conservatives and socialists may agree on most fundamental human rights even though they share few or no other normative beliefs. From a practical point of view, disagreement on the grounds of these rights is quite unimportant as long as we agree on at least the basic rights. Even though agreement on a comprehensive list of human rights in the IHR practice may sometimes seem hard enough to reach and is likely to remain precarious, it is certainly easier to attain than agreement on any substantive theory of moral rights.

Whether naturalist theories of human rights are indeed parochial is a controversial matter. In fact, those who assume that they are usually don't find it necessary to substantiate their assumption. The reason for this, I suspect, is that it is not at all clear what it means to say that a theory is parochial or culturally specific. Another problem is this: Suppose that we accept, for the sake of argument, that existing natural rights theories are culturally specific. Assuming that these

theories and the cultural experience from which they have emerged have had a significant influence on the development of the human rights movement, how do we know that the idea of human rights is not culturally specific as well? Can we just take for granted that discarding the theory and replacing the phrase "natural rights" with "human rights" suffices to shrug off the cultural baggage that came with the former? This raises another issue: Is it legitimate to set non-parochialism as a criterion for a proper concept of human rights? In one sense, human rights are of course necessarily universal: nothing is a human right if it is not held by all human beings. But if we think an idea or a theory can be parochial, it can hardly be satisfactory to assume from the outset that nothing can count as an idea of human rights unless it is non-parochial. The demand that it must be non-parochial makes sense if one intends to build a normative theory, but it is unwarranted when one is primarily interested in understanding the concept itself.

HUMAN RIGHTS AS A CULTURAL PHENOMENON

Although this overview was much too brief to establish any firm conclusions, the foregoing discussion may nevertheless motivate us to explore an alternative to both naturalist and political theories of human rights. I suggest that an illuminating way to study the idea of human rights is to probe the structure of our beliefs about human rights. Rather than asking which rights we might have, I shall suggest that we might profitably ask which rights *we think we have*. Call this the descriptive approach. Another way to put this is that we should think of the idea of human

rights as a cultural phenomenon. How is the descriptive approach different from that of (naturalist and political) normative theories? I can only briefly mention five points.

First, the descriptive approach is not committed to taking a position regarding the truth-value of normative claims. Normative theories of human rights strive to answer questions such as “Which human rights do we have?” “What grounds our rights?” and “Who has duties to provide the things to which we have rights?” They attempt to ground rights, for example, in claims about human nature, or claims about prerequisites for the legitimacy of states. The descriptive approach is not interested either in affirming, or in rejecting the truth-value of normative claims. It does not deny that normative questions are important in their own right, but it leaves these questions aside.

Secondly, normative theories are (or can be) revisionist with regards to commonly accepted beliefs about human rights. A normative theory could make a case for the existence of certain human rights that haven’t made it to any widely accepted list. Or it could entail that we do not really have a human right to some of the things that are widely claimed to be human rights. There clearly is only a limited stretch on the ability of normative theories to redraw the boundaries of human rights. If a theory entails too many claims that run counter to what most of us are inclined to believe—for example, if its list of human rights is too sparse or too capacious—we may conclude that the theory doesn’t capture the idea of human rights adequately. For obvious reasons, the descriptive approach cannot be revisionist in the same way as a normative theory.

A descriptive approach cannot take beliefs of individuals as basic, but must take as its subject a cultural tradition as a whole.

This opens up a tangle of thorny questions, like: Is there a group of people whose beliefs on the topic are similar enough to allow amalgamation? But answers to such questions cannot be settled in advance: they must be the result of the description. This brings us to the third point, which is that we may treat normative theories themselves as a source of knowledge about the idea of human rights. Normative theorists are rarely interested in merely stating what others think: they want to argue what human rights are, not what we think they are. However, most normative theorists have attempted to appeal to widely shared ideas about human rights, the many articles and books that they have written on the topic provide a convenient source of information for anyone who wants to access these ideas. That is not to say that the process of basing claims about what “we” believe about human rights on a sample of these theories is entirely unproblematic.

The fourth point will be controversial: normative theories of human rights not only provide a good source for studying human rights as a cultural phenomenon, but also provide *the best available* source of its kind. Studying human rights as a cultural phenomenon essentially is studying the practical experience which brought into being the tradition of human rights theories. The descriptive approach studies theories as theoretical reflections on this practical experience (though these theoretical reflections of course helped in turn to shape that experience).

Fifthly, the description of human rights theories must be historical in its scope. This is because the complex development of the idea of human rights has left us with theoretical problems which can only be fully untangled by taking into account intuitive remnants from past incarnations of these theories.

Unfortunately I can only give the briefest possible outline of the story that would emerge if we put this approach to work. The experience which has brought human rights theories into being is that of a culture which has for some time been influenced by a monotheistic religion. In such a religion, the basic ethical requirement is to obey the commands of the author of the universe. This has engendered a shift in ethical outlook from a virtue ethics to a law-like morality (Anscombe, 1958, Williams, 1985). A necessary component of this ethical outlook is the idea that human beings have a will, and hence that all genuine actions are intentional actions (Dihle, 1982). Religion further spreads the idea that human beings have a role to play in God's plan, and hence that certain sets of actions are morally necessary.

From this ethical outlook and its conception of the requirements of agency, two distinct (traditions of) natural rights theories have emerged (Tuck, 1979, Van Duffel, 2010). The first is a theory of rights to subsistence or "welfare rights" (in a very broad sense). It starts from the idea that people must be able to make decisions and act upon them. In the religious version, it requires people to maintain the conditions created by God that enable people to act upon His will. The secular version requires us to generate the conditions that allow people to realize their goals. The second is a theory of "property rights" (again in a very broad sense). It starts from the idea that our acts of will have normative consequences for others. It secularizes the idea of God's authority over his creation by suggesting that human beings create as well and that they must have a similar authority over their creation.

A full defense of this approach involves showing that it resolves the problems that

plague the other approaches. I shall, again all too briefly, indicate how it might do this.

1. The account generated by the descriptive approach will be consonant with our most stable intuitions on the topic if these intuitions are nontrivially shaped by the two traditions of natural rights theories, as indeed they are. One way in which it is easy to see the superiority of this approach is that it can accommodate the fact that our intuitions were formed by two theories which are practically incompatible and have generated conflicting sets of rights (fundamental property rights of pharmaceutical companies versus rights of patients, for example, or rights of democratic majorities versus rights of individuals).

2. An account of human rights should be able to accommodate both the sense in which these rights are conceived as interactional (held by all against all individuals) as well as the special place of governments both in IHR and in our intuitions regarding human rights. One way in which the descriptive approach is again superior to both naturalist and political theories is that it can do this by showing that these seemingly conflicting intuitions are the result of the influence of two conflicting theories of natural rights *and* the result of the historical development of the theory of welfare rights.

3. The descriptive approach does not aim to curb human rights inflation, but rather aims to explain *both* the phenomenon of human rights inflation *and* the intuition that this inflation is deeply problematic. It does this by showing how inflation is the result of the secularization of the theory of rights to subsistence (for this point and the next, see Van Duffel, 2013).

4. The problem of assigning duties correlative to positive rights can also be explained by the same account. Historically, rights to subsistence were negative rights, not positive

rights. Hence the correlative duties could not be excessively demanding. Again the descriptive approach helps us describe human rights without violating crucial intuitions.

5. The descriptive approach explains the persistent suspicion that the idea of human rights is culturally specific, but it does this without entailing cultural relativism. Although we may be indeed feel compelled to reconsider the soundness of current human rights theories, none of this implies that we should tolerate cruelty or persecution in the name of culture.

CONCLUSION

Proponents of political theories are right when they point out shortcomings of naturalistic theories of human rights. However, political theories are certainly not replacement for theories of moral human rights. At most, they might fill a hiatus in our theorizing about IHR. Although the case for the descriptive approach is tentative and as yet underdeveloped, this approach may help further our understanding of human rights in the context of political philosophy.

WORKS CITED

- Anscombe, G. E. M. (1958), "Modern Moral Philosophy," *Philosophy*, 33: 1–19.
- Beitz, C. (2009), *The Idea of Human Rights*. New York: Oxford University Press.
- Buchanan, A. (2010), "The Egalitarianism of Human Rights," *Ethics*, 120: 679–710.
- Cranston, M. (1967) "Human Rights, Real and Supposed," in D. D. Raphael (ed.), *Political Theory and the Rights of Man*. Minneapolis, MN: Indiana University Press.
- Dihle, A. (1982), *The Theory of Will in Classical Antiquity*. Berkeley, CA: University of California Press.
- Gewirth, A. (1978), *Reason and Morality*. Chicago: University of Chicago Press.
- Griffin, J. (2008), *On Human Rights*. New York: Oxford University Press.
- Rawls, J. (1999), *The Law of Peoples*. Cambridge, MA: Harvard University Press.
- Steinhoff, U. (2012), "Unsavoury Implications Unsavoury Implications of A Theory of Justice and The Law of Peoples: The Denial of Human Rights and the Justification of Slavery," *The Philosophical Forum*, 43(2): 175–196.
- Tasioulas, J. (2009), "Are Human Rights Essentially Triggers for Intervention?" *Philosophy Compass*, 4 (6): 938–950.
- Tuck, R. (1979), *Natural Rights Theories: Their Origin and Development*. Cambridge: Cambridge University Press.
- Van Duffel, S. (2010), "From Objective Right to Subjective Rights: The Franciscans and the Interest and Will Conceptions of Rights," in V. Mäkinen (ed.), *The Nature of Rights: Moral and Political Aspects of Rights in Late Medieval and Early Modern Philosophy*. Helsinki: The Philosophical Society of Finland.
- (2013), "Natural Rights to Welfare," *The European Journal of Philosophy*, 21 (4): 641–664.
- Wellman, C. (2011), *The Moral Dimensions of Human Rights*. New York: Oxford University Press.
- Williams, B. (1985), *Ethics and the Limits of Philosophy*. Cambridge, MA: Harvard University Press.

